United Nations A/CN.9/SR.742

General Assembly

Distr.: General
23 July 2002

Original: English

United Nations Commission on International Trade Law
Thirty-fifth session

Summary record of the 742nd meeting
Held at Headquarters, New York, on Tuesday, 18 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

Election of officers (*continued*)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

02-43168 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.15 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514)

Draft article 7. Conduct of conciliation (*continued*)

1. **Mr. Zanker** (Observer for Australia), referring to paragraph (4) of article 7, suggested that the word "conciliator" should be replaced by the words "conciliator or the panel of conciliators" in order to bring paragraph (4) in line with paragraphs (2) and (3) of the same article.

2. **The Chairman** said that the Australian suggestion would be referred to the drafting group.

3. *It was so decided.*

Draft article 8. Communication between conciliator and parties

4. **Mr. Markus** (Observer for Switzerland) said that the phrase "unless otherwise agreed by the parties" seemed unnecessary, since that provision was already covered by draft article 3. He suggested that the matter should be referred to the drafting group.

5. **The Chairman** recalled that the Working Group had decided to state the common rule in draft article 3 but had felt that there were other cases in which it was appropriate to emphasize the principle it embodied. The Working Group had referred the matter to the drafting group and accepted the text produced by that group. He suggested that the drafting group should be asked once again to review the use of the phrase "unless otherwise agreed by the parties".

6. **Mr. Sekolec** (Secretary of the Commission) pointed out that the drafting problem had arisen during discussion of the first draft, and it had been decided to include the general rule and leave the phrase "unless otherwise agreed by the parties" in other articles for emphasis. No decision had been made regarding the whole text. He was not sure the drafting group would be the right body to consider the matter at the present stage of its work, inasmuch as it was now concerned with the task of harmonizing the six language versions of the entire text. He suggested that the Commission should take a stand on the principle involved.

7. **The Chairman** recalled that in the case of draft article 13, which dealt with a very sensitive issue, the Working Group had decided that the phrase "unless otherwise agreed by the parties" should be retained. Bearing in mind the information provided by the Secretary, he suggested that the matter should be decided by the Commission rather than the drafting group.

8. **Mr. Tang** Houzhi (China) said that the expression "unless otherwise agreed by the parties" should be expressly stated in all the articles where the principle was applicable, even though the general rule had already been established in draft article 3. There was no need to change draft article 8.

9. **The Chairman** said that, if he heard no objection, he would take it that the phrase "unless otherwise agreed by the parties" should be deleted from draft article 8.

10. *It was so decided.*

Draft article 9. Disclosure of information between the parties

11. **Ms. Beleva** (Observer for Bulgaria) asked whether the use of the verb "may" in the first part of article 9 meant that the conciliator, the panel of conciliators or a member of the panel could decide whether or not to disclose the information to the other party.

12. **The Chairman** explained that the conciliator could receive confidential information from one of the parties and, if he or she deemed it appropriate in order to bring the parties closer together, could disclose the information either individually to the parties or in a caucus. The conciliator could not disclose the information he had received if he was not authorized to do so by the party. The other solution considered by the Working Group was that the conciliator could receive the information and was free to disclose it unless the party providing the information indicated that it should remain confidential. The Working Group had opted for the second solution because it seemed to be more in line with current practice.

13. **Ms. Beleva** (Observer for Bulgaria) asked what would be done in regard to information that was not considered confidential by the party providing it.

14. **Mr. Zanker** (Observer for Australia) suggested the following amendment:

> Delete the entire text after the word "panel" in the third line and replace it by the following: "shall not disclose that information to any other party unless the party giving the information expressly consents to such disclosure."

15. The effectiveness of conciliation depended to a large extent upon the parties to a dispute communicating privately to the conciliator their candid views on the dispute. Accordingly, there should be an absolute prohibition on the disclosure by the conciliator of anything that occurred in private meetings and in other discussions with the parties unless a party specifically authorized otherwise. The approach to disclosure in draft article 9 was derived from article 10 of the UNCITRAL Conciliation Rules, which had been developed in 1980 at a time when the process of commercial conciliation was imperfectly understood and very little practised. That formulation was inappropriate and had not been widely embraced. It certainly did not reflect current conciliation practice in Australia. Moreover, the opposite formulation now prevailed in published commercial mediation and conciliation agreements used as precedent in Australia and elsewhere.

16. **The Chairman** recalled that the wording on disclosure had been discussed by the Working Group, as reported in paragraphs 78 to 82 of the report of the Working Group on Arbitration (A/CN.9/506). The Working Group had decided in favour of the present text.

17. **Mr. Marsh** (United Kingdom) said that his delegation agreed with the Australian position. However, since the matter had been discussed fully by the Working Group and the present text had been accepted by the majority of the Group, he would be reluctant to re-open the debate. He noted that the present text needed tweaking to cover multi-party situations, and the text suggested by the Australian delegation accomplished that by using the wording "any other party" rather than "the other party".

18. He also wished to point out that the information which was the subject of the clause was currently limited to information concerning the dispute; however, there was the possibility that a disclosure might be made in the course of the conciliation relating to a corporate practice of one of the parties which might not necessarily pertain to the dispute but which was nonetheless confidential. The phrase "information concerning the dispute" was somewhat restrictive. Also, according to the present text, the conciliator could receive "information concerning the dispute" but only pass on "the substance" of that information. The distinction between the two phrases was not clear, and the text could lead to misunderstanding.

19. **Mr. Möller** (Observer for Finland) said that it would be counterproductive to re-open the discussion on draft article 9. Moreover, the Australian proposal would not be consistent with the UNCITRAL Conciliation Rules.

20. **Mr. Barsy** (Sudan) said that his delegation supported the Australian proposal. The conciliator should only disclose information with the express consent of the party giving the information. Moreover, his delegation interpreted the first sentence of the draft article to mean that the conciliator could only disclose information received from a party during the conciliation proceedings, not information the conciliator might have obtained from other sources. If the conciliator could disclose information obtained outside the conciliation proceedings, the parties concerned might not know that he had such information and would therefore not be in a position to specify that it should be kept confidential.

21. **Mr. Graham** (Mexico) said his delegation would prefer that the Working Group's consensus should not be re-opened to debate. In favour of the text as it stood, he would argue that it was part of the role of conciliator to be a channel of communication between the parties, and in the process the conciliator necessarily shared information that the parties had given him. If the conciliator were required to obtain permission each time to transmit information to the other party, the process would become unnecessarily cumbersome and far less effective.

22. **Mr. Jacquet** (France) said that his delegation was in favour of retaining the present text, despite the arguments of the Australian delegation, but by no means felt that debate should be cut off merely on the grounds that the Working Group had reached a consensus, on that or on other points. The reasons for

the consensus could appropriately be reconsidered in the Commission.

23. With regard to the title of the article, "Disclosure of information between the parties", in French "Communication d'informations entre les parties", he would prefer to replace "*communication*" by "*divulgation*" in the French title, partly to distinguish it from the title to draft article 8. In all language versions, he would suggest eliminating the words "between the parties", since the thrust of the text was that the parties were not communicating directly but were receiving information through the intermediary of the conciliator.

24. **Mr. Reyes** (Colombia) said that his delegation preferred to retain the text arrived at by consensus in the Working Group. In the Spanish title, the word "*revelación*" should be replaced by "*divulgación*" as a rendering of "disclosure".

25. **Ms. Moosa** (Singapore) said that, although her delegation agreed with Australia and had advanced the same position in the Working Group, it did not wish to re-open the debate. It was nonetheless concerned that parties might not be aware that any information they revealed would be passed along unless they specifically stated otherwise. Her delegation proposed that the Guide to Enactment should instruct conciliators to make that point clear to the parties at the outset.

26. **Mr. Cosman** (Canada) said that his delegation supported the present text and agreed with Finland that, unless there was evidence that the UNCITRAL Conciliation Rules were not working, the debate should not be re-opened. In the experience of his delegation, conciliation was effective with a rule similar to that in draft article 9.

27. **Mr. Shimizu** (Japan) said that his delegation had questions about the use of the words "substance of the information" in the first sentence of draft article 9. At issue was whether it was the duty of the conciliator to disclose the information. On the assumption that the conciliator had a duty to disclose, the Working Group had introduced the word "substance" to avoid burdening the conciliator with an obligation to communicate the literal content of any information received from the parties. But according to paragraph 56 of the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/514), the conciliator had the freedom, but not the duty, to disclose such information to the other party. On that interpretation, the word "substance" was superfluous, and should be deleted, since it represented a subtle distinction that would be hard to explain to legislators.

28. **Mr. Medrek** (Morocco) said that his delegation preferred not to re-open the debate on the principle expressed in draft article 9. With regard to the title, it supported the proposal of France to delete the words "between the parties" and in the French version to replace "*communication*" by "*divulgation*".

29. **Mr. Tang** Houzhi (China) said that his delegation also preferred the existing text. The arguments for the opposing principle had been thoroughly debated in the Working Group.

30. **The Chairman** said that the reasons for using the term, "the substance of the information", could be included in the Guide to Enactment. With regard to the title of draft article 9, there was precedent for deleting the words "between the parties", since article 10 of the UNCITRAL Conciliation Rules, with similar content, was entitled simply "Disclosure of information".

31. **Mr. Markus** (Observer for Switzerland) said that his delegation preferred the text as it stood but was in favour of eliminating the words "between the parties" from the title. It agreed with Singapore that it was very important for the conciliator to explain to the parties at the outset that they must specify if there was information that they did wish to have disclosed. The Guide to Enactment should make that clear.

32. **Mr. Heger** (Germany) said that his delegation also supported the principle expressed in draft article 9 as it stood. The point raised by Singapore and Switzerland was pertinent, but he feared that there was a danger of making the Guide to Enactment overly formalistic, whereas the thrust of draft article 9 was to promote flexibility.

33. **Mr. García Feraud** (Observer for Ecuador) said that draft article 9 dealt with disclosure of information to the parties to the conciliation, not to outsiders. It was important in the title to indicate the intended recipients. The phrase, "between the parties", should not be deleted but amended to read "to the parties".

34. **Mr. Rendón** (Mexico) said that the word "*contenido*" in the Spanish version was not a good rendering of the English "substance".

35. **Mr. Zanker** (Observer for Australia) said that he hoped the proposal of the United Kingdom to change

"to the other party" to "any other party" in both the first and second sentences, to take account of situations in which there were more than two parties involved in the conciliation proceedings, would be given consideration.

36. **The Chairman** said that there seemed to be a consensus on making that change proposed by the United Kingdom and on amending the title to align it with the title of article 10 of the UNCITRAL Conciliation Rules.

37. *It was so decided.*

Draft article 10. Duty of confidentiality

38. **Mr. Kovar** (United States of America) said that the mediation community in the United States was enthusiastic about the Model Law but had expressed reservations about draft article 10. The crux of the problem was expressed in the title, "Duty of confidentiality". Under United States tort law a breach of that duty would result in liability. And since the definition of conciliation in article 1, paragraph (2), was very broad, article 10 might create a trap for those who had engaged in conciliation so informal that they were unaware that it was covered under the Model Law and might unwittingly breach the duty of confidentiality.

39. His delegation therefore proposed that the opening phrase, "Unless otherwise agreed by the parties", should be changed to "Whenever agreed by the parties". That amendment altered the situation to one in which parties must agree before assuming the duty of confidentiality. Confidentiality was indeed central to the Model Law, but the most critical confidentiality issues were those dealt with in draft article 9 on disclosure to parties through the conciliator and draft article 11 on the admissibility of evidence in other proceedings.

The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.

40. **Mr. Barsy** (Sudan) proposed inserting the words "Subject to article 9" at the beginning of article 10. That would remove any possibility of conflict between articles 9 and 10. He also proposed replacing "information relating to the conciliation proceedings", by "information relating to the dispute", which was a wider formulation similar to the one used in draft article 9, and would ensure harmony between the two articles.

41. **Mr. Jacquet** (France), commenting on the proposal by the United States representative, said he thought the fears expressed were exaggerated and the proposed remedy would be worse than the evil it was supposed to correct. It was true that according to the present wording of draft article 10, conciliators could not be released from their duty of confidentiality except by an express agreement between the parties. However, the Model Law did not impose any sanctions for a breach of confidentiality. The only sanctions available were those found in national law, where liability would most probably arise from the contract between the parties. Draft article 10 would then be only one of the factors involved in determining the gravity of a breach of confidentiality. Moreover, the duty of confidentiality was only one of a number of obligations with which a conciliator must comply, and which were not sanctioned by the Model Law.

42. The representative of the United States was anxious to protect the interests of the conciliators, which was understandable, but the law of conciliation was designed for the parties as well as for the conciliators. If conciliators were exempted from any duty of confidentiality, the parties could justifiably object that they had a right to expect information to be kept confidential. All the existing rules on conciliation stated the duty of confidentiality in express terms, and it would be odd if the Model Law, which would take pride of place for international purposes, were to exclude the requirement, however small the risk that a conciliator would pass on information acquired in the course of his duties. Since the United States representative took the view that it was the language of draft article 1 which was lacking, the rule of confidentiality should be placed there, rather than in draft article 10.

43. **Mr. Miki** (Japan) supported the proposal by the representative of the United States. He shared his concern that the language of draft article 1 was too broad and vague, and tended to minimize the duty of confidentiality.

44. **Mr. Joko Smart** (Sierra Leone) said that apart from the two exceptions stated in draft article 10, the duty of confidentiality was absolute. There was no need for the additional phrase proposed by the United States representative.

45. **Mr. Möller** (Observer for Finland) said he shared the concern of the United States that the definition of conciliation in the Model Law was too broad for the purpose of framing a duty of conciliation. However, he doubted the wisdom of the proposed solution. In most cases where parties resorted to conciliation to resolve a dispute amicably, they did so on the assumption that information would be kept confidential, but that undertaking was usually an implied rather than an express term of their agreement. Making it explicit would mean that in the absence of an agreement to that effect, there would be no duty of confidentiality.

46. One solution might be to delete draft article 10 altogether. However, confidentiality was an absolute requirement and the Model Law ought to contain some kind of provision for it. In most national legal systems, the risk of a conciliator incurring civil liability for disclosing information about a dispute was relatively slight, and the conciliator would have to be aware that his or her actions had been in that capacity.

47. The addition proposed by the United States was difficult to accept, because it would require the express agreement of the parties to preserve confidentiality, and when the need arose the parties would not necessarily know they had entered a conciliation process. He suggested either deleting the words "Unless otherwise agreed" or finding an alternative formulation.

48. **Mr. Morán Bovio** (Spain) said the proposal by the representative of Sudan to tie draft article 10 to draft article 9 could be useful, because it would place draft article 10 in the proper context. As for the proposal by the United States delegation, there was no doubt in anyone's mind that the duty of confidentiality was primordial. That being so, he favoured the proposal to insert the words "Whenever agreed by the parties" at the beginning of draft article 10, because those words alerted the parties to the need to take a clear position on confidentiality, and would thus have the effect of strengthening it. The parties would state the duty of confidentiality in their agreement, and would in turn convey it to the conciliator.

49. **Mr. Hunter** (International Council for Commercial Arbitration) wondered if the concern expressed by the United States could be alleviated by including, in a second paragraph of draft article 10, a statement that nothing in that article would create any liability in relation to the conduct of a mediator in connection with the duty of confidentiality.

50. **Mr. Getty** (United States of America) explained that his delegation was not concerned by the liability of conciliators. According to the language it proposed, conciliators in breach of an agreement not to divulge information concerning a particular dispute would be liable. Rather, its concerns were twofold. Firstly, a party to the mediation who did not know that the law made the presumption of confidentiality could be liable if he or she told a friend or neighbour about aspects of the conciliation. Secondly, in view of the broad definition of conciliation given in draft article 1, any third party invited to participate in a discussion with a view to resolving a dispute could unwittingly become subject to liability in relation to the duty of confidentiality. Even businessmen chatting over dinner could find themselves liable to a duty of confidentiality, without intending to enter into an official conciliation process. The amendment proposed by his delegation would shift the focus to protect inadvertent parties.

51. **The Chairman** explained the difference between draft articles 9 and 10. Whereas the former applied solely to conciliators, establishing rules governing their right to disclose information received from one party to the other, the latter article had been added by the Working Group in order to bind all the parties to a dispute to a duty of confidentiality.

52. **Mr. Cosman** (Canada) said that his delegation reserved its right not to take a final decision on the amendment proposed by the United States delegation until clarification was given of whether the duty of confidentiality established by draft article 10 was intended to apply to all of the parties, or just to the conciliator. In the light of the comments made by the Chairman, he assumed that the intention was to refer to all parties.

53. **The Chairman** suggested that the current text of draft article 10 should be approved, in the absence of clear support for the amendment proposed by the United States representative.

54. **Ms. Moosa** (Singapore) said she shared the concern that draft article 10 was not explicit enough regarding the persons to whom the duty of confidentiality applied. In her understanding, it referred to all parties receiving information pertaining to a dispute, which might include conciliators, members of conciliation panels or institutions, as well

as all parties to a dispute, and words to that effect should be inserted into the text.

55. **The Chairman** said that the current wording of the text would be retained, with the exception of the removal of the clause "unless otherwise agreed by the parties". The concerns expressed by the delegations of the United States of America and Singapore could be considered in the Guide to Enactment. He confirmed that the Working Group envisaged that draft article 10 should refer to all of the parties involved in a dispute.

56. **Mr. Kovar** (United States of America) expressed surprise at the conclusion that an agreement had been reached to remove the opening clause of draft article 10. There had not been a very careful discussion of the possible consequences of that step, and only one delegation had expressed its support for the proposal.

57. He emphasized the importance of the concern raised by his delegation regarding the liability of unwitting conciliators. During drafting of the United States Uniform Mediation Act, similar concerns had been expressed over the strict regulation of an essentially informal process. He failed to understand the purpose of draft article 10, other than to create liability for breach of the duty of confidentiality.

58. The Uniform Mediation Act included a precise definition of conciliation, in order to make clear to the parties involved at what stage they could be considered to have entered a process with legal consequences. It established three alternatives for the commencement of a formal conciliation process: agreement by the parties in writing (in electronic format or otherwise), a court order to enter into conciliation, or a request by the parties to engage the services of a known, professional conciliator. When the general definition of conciliation had been formulated for the draft Model Law, the implications on legal liability for breach of confidentiality had not been taken into account. He reiterated his disappointment that a more sustained effort had not been made to find a solution to a problem which, for his delegation, constituted a serious obstacle to implementing the Model Law.

59. **The Chairman** said he had responded to the concerns of the United States delegation by holding consultations with the various representatives. However, in the absence of clear support for the proposed amendment, its concerns should not affect the main text, but would be considered thoroughly in the Guide to Enactment. Nevertheless, he invited the representative of the United States of America to continue consultations on the issue, and offered his support for those discussions. With regard to the removal of the clause "unless otherwise agreed by the parties", the tendency of the Commission since the consideration of draft article 8, in view of the provisions of draft article 3, was to remove such references. Three delegations had specifically indicated their support for that step, and none had opposed it.

60. **Mr. Jacquet** (France) agreed with the United States representative that there had not been sufficient discussion of the implications of removing the opening clause from draft article 10. There was a difference between the provisions of draft article 3 and the insertion of the clause "unless otherwise agreed by the parties". Draft article 3 was intended for parties wishing to take a formal decision at the outset not to apply certain provisions of the Model Law. The clause "unless otherwise agreed by the parties", however, could refer to agreements made during the course of conciliation proceedings. Therefore it was important to provide parties with the specific option to remove the duty of confidentiality at any time during proceedings.

61. Acknowledging the problem pertaining to the definition of conciliation, he said it was nevertheless impossible to satisfy the concerns expressed, because the definition given in the draft Model Law was descriptive, rather than prescriptive. It had been decided not to include specific provisions on the nature of the agreement to enter into conciliation. Consequently, there could be no conditions on what constituted conciliation.

62. **Mr. García Feraud** (Observer for Ecuador) said that the question of confidentiality had already been discussed at length in the Working Group, and that the clause "unless otherwise agreed by the parties" had appeared in the text since the initial drafts.

63. **Mr. Kovar** (United States of America) suggested that the drafting group might remove the word "duty" from the heading of draft article 10, given that it had strong connotations relating to liability, and insert the word "formal" before "conciliation proceedings", to make it clear that dinner-table discussions would not have legal consequences.

Election of officers (*continued*)

64. **Mr. Heger** (Germany), speaking on behalf of the Group of Western European and Other States, nominated Mr. Morán Bovio (Spain) for the office of Rapporteur.

65. *Mr. Morán Bovio (Spain) was elected Rapporteur by acclamation.*

The meeting rose at 6 p.m.